OEDCA DIGEST

Vol. I, No. 1 **Department of Veterans Affairs** **Fall 1998**
Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this first issue include same-sex harassment, sexual harassment, same-race harassment, retaliation (including *per se* violations), "direct threat" disability cases, reasonable accommodation cases, nurse promotions, and other frequently raised issues.

Also included in this issue is a brief note concerning EEOC's new guidance on analyzing retaliation claims. This revised guidance was recently issued as a new section in the *EEOC Compliance Manual.*

Charles R. Delobe

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I

AGENCY REGULATION REQUIRING UNRESTRICTED LICENSURE FOR LPN POSITIONS NOT AN ABSOLUTE DEFENSE IN A DISABILITY ACCOMMODATION CLAIM.

The complainant, a recovering drug addict, was issued a restricted LPN license by a state licensing authority. The restriction stemmed from his prior illegal drug use and provided, in pertinent part, that he could not administer narcotics or mood-altering drugs for a period of one year. The restriction did not preclude him from administering other types of drugs or performing any other LPN duties. Applicable VA regulations require that a person hired as an LPN have "current, full and unrestricted licensure…before being appointed…."

Following notification that he had been hired for an LPN vacancy in a Nursing Home Care Unit, but prior to his scheduled reporting date, HRMS officials learned of the licensure restriction and advised him that he could not be appointed because of the above regulation. He then filed a complaint alleging that the Department had discriminated against him because of his disability, *i.e.,* his past record of illegal drug abuse. The Department countered by claiming that it was bound by its hiring regulations requiring unrestricted licensure. Moreover, even if the complainant could have been hired, the Department argued that accommodating his restriction would have created an undue hardship, as other nursing personnel would have had to perform some of his duties, *i.e*., dispensing narcotic and mood-altering drugs, until the restriction expired.

Finally, the Department argued that the restriction could jeopardize patient care, if there were no other nurses available to administer these drugs.

OEDCA's decision rejected all of these arguments, finding instead that the Department's refusal to hire the complainant violated *the Rehabilitation Act of 1973*. First, OEDCA noted that there was no dispute that the complainant was an "individual with a disability," as the evidence showed he was successfully recovering from his drug addiction and was not using illegal drugs when he applied. Next, OEDCA determined that his restriction could have been reasonably accommodated despite the Department's claim to the contrary. Undisputed testimony provided by nurses at the facility demonstrated that the complainant was otherwise able to perform all of the functions of the LPN position, except for administering narcotic or mood-altering drugs. They further testified that other nursing personnel could have dispensed this type of medication, and that such an accommodation would not have been unduly burdensome on the nursing service.

As to the claim that such an accommodation would have jeopardized patient care, OEDCA found that the Department had failed to conduct the type of individualized assessment required by law before a disability can be considered a health or safety threat. Moreover, even assuming for the sake of argument that the complainant's license restriction posed such a threat,

nursing service personnel provided undisputed testimony that the above accommodation would have eliminated any risk. Finally, OEDCA noted that an employer may not rely on its internal policies and regulations as a justification for failing to comply with the reasonable accommodation requirements of the *Rehabilitation Act*.

II

MEDICAL CENTER THAT FAILED TO TAKE PROMPT, EFFECTIVE ACTION IS LIABLE FOR SEXUAL HARASSMENT AND ASSAULT BY A VOLUNTEER/PATIENT

The complainant worked as a medical clerk in a mental hygiene clinic. Beginning in December, she began receiving unwelcome attention from a male volunteer at the medical center. The volunteer was also a frequent patient at the clinic.

The unwelcome attention included, among other things, telling her she was attractive, attempting to strike up conversations with her in her work area, following her to her car after work, following her to the bathroom during the day, following her to the gym where she exercised, and sending her love letters. The complainant promptly reported these incidents to her first level supervisor. The supervisor did nothing other than tease her about her new "boyfriend" and recommend that she report the matter to the harasser's therapist in the mental hygiene clinic.

In accordance with her supervisor's suggestion, she reported the incidents to the therapist sometime in late December or early January, and provided him with the love letters she had received. She also reported the matter to the head of the clinic, who responded by simply advising her to let him know if the harassment continued.

The therapist, who was aware that the harasser had sexually harassed patients in the past, responded by placing the love letters in the harasser's medical file and asking the harasser to enter into an oral "contract." Under the terms of the contract, the harasser agreed not to follow the complainant, not to enter the area of the clinic where the complainant worked, and not to make inappropriate comments of a sexual nature to the complainant or other female staff. There was no indication in the record as to what the consequences would be if the harasser violated the "contract."

Despite the contract, the harassment continued during the months of January and February. The harasser continued to frequent the complainant's work area and follow her when she left the office; and the complainant continued to report these incidents to her supervisor and the therapist.

In February, the harasser told the complainant that he could "see someone raping her and that God had told him that he was to kill her." Shortly after she reported this incident, management responded by reassigning her to an isolated area in the building. The complainant protested the move, citing her fear that the harasser would find her and that she would be vulnerable. Despite assurances from management that she would be safe in her new

location, the harasser visited her no less than ten times on her first day there. Later that day, as she was leaving work, the harasser grabbed her, slammed her body against a wall, and tried to force her to the ground. The complainant fought off the attack and immediately reported the incident to management and law enforcement authorities. She subsequently filed a sexual harassment complaint claiming, among other things, that management had failed to act promptly and effectively to stop the harassment and prevent the assault.

OEDCA found that the incidents of harassment occurred as alleged by the complainant; that she promptly reported the incidents as she was required to do; and that management, despite knowledge of the harasser's past history of harassing patients, failed to act promptly and effectively to prevent the harassment from continuing. Management's initial response (*i.e.,* the "contract") failed to put an end to the harassment. Furthermore, management officials were aware that the contract was being violated and did nothing further to shield the complainant until they learned of the harasser's threatening comments. Their reaction to that event -- relocating the complainant against her wishes to a secluded area -- was also ineffective, as evidenced by the assault against her on her first day at the new location.

In its decision, OEDCA noted that the VA was liable even though the harasser was not an employee. As the harasser was both a volunteer at the facility and a frequent patient, management had the authority and the obligation to exercise control over the individual to ensure that he did not harass or harm employees or patients.

III

COMPLAINANT, WHO SUFFERED FROM JOB-RELATED STRESS, ANXIETY, AND DEPRESSION, WAS NOT DISABLED BECAUSE HE FAILED TO PROVE THAT THESE CONDITIONS SUBSTANTIALLY LIMITED HIS ABILITY TO WORK

An employee filed a complaint alleging, among other things, that he had received an "unsatisfactory" performance appraisal because of his disabilities (job-related stress, anxiety, and depression). Following a hearing, an EEOC administrative judge issued a recommended finding of discrimination as to that claim.

The record showed that the complainant had used a combination of annual and sick leave to take a large number of days off from work, totaling several weeks, because of job-related stress, anxiety, and depression, and that these conditions were primarily caused by an interpersonal conflict with his supervisor. Upon returning to work, he received a "special" performance appraisal rating him as "unsatisfactory", even though he was out on leave for more than half of the rating period covered by the special appraisal. Due to anxiety caused by the appraisal, he then took additional leave, this time for approximately two months.

After reviewing the entire record, OEDCA rejected the administrative judge's recommendation, finding instead that the complainant had failed to prove

that he was an "individual with a disability," as that term is defined in the *Rehabilitation Act* and EEOC's regulations implementing the Act. While he did present some medical evidence regarding these conditions, including notes from his doctor indicating that he needed some time off from work, he failed to prove that these conditions substantially limited any major life activities.

Although he alleged that the conditions significantly impaired his ability to work, the record disclosed that, at most, he was temporarily unable to function effectively under one supervisor, thus prompting him to take time off from work. After he had exhausted all of his annual and sick leave, he resumed working under the same supervisor, and was able to perform all of the duties of his job.

When employees allege that a medical condition such as stress, anxiety, or depression impairs their ability to work, they must prove by a preponderance of the evidence that the condition affects much more than simply their ability to do a particular job, or work for a particular supervisor. Instead, they must demonstrate that the condition significantly restricts overall employment opportunities -- that is – the condition restricts their ability to perform a class of jobs, or a broad range of jobs in various classes. As complainant failed to present any evidence of such a restriction, and given his ability to continue working in the same job after exhausting his available leave, OEDCA found that he was not disabled. Hence, he failed to establish a *prima facie* case of discrimination.

IV

PROVIDING A PARKING SPACE MAY BE REQUIRED AS A REASONABLE ACCOMMODATION IN APPROPRIATE CIRCUMSTANCES

The complainant, who is paralyzed from the waist down, worked at a VA regional office located in a GSA building. The VARO leased twenty parking spaces from GSA and assigned them to government vehicles, VA executives, visitors, and car pools. None were assigned to disabled employees. The spaces were located in the basement of the building and GSA limited the number of spaces each tenant agency could lease.

Complainant requested one of those spaces, stating that he needed it to accommodate his disability. He stated that he often had to park one or two blocks from the building, and cross a four or five lane street to access the building each day. In the winter, he found it both difficult and dangerous to maneuver his wheel chair in snow or ice, and he often arrived at work soaking wet on rainy days.

Management denied his request, providing him, instead, with a temporary permit to park on a ramp next to the building. That permit was not renewed when it expired. When the complainant renewed his request for an assigned space, the request was again denied.

Management officials offered several reasons for denying the request. The primary reason, however, appeared to be cost, which amounted to between $1500 and $1900 per year. OEDCA

found that complainant's need for accommodation was legitimate and necessary to enable him to get to work safely. It noted that the Equal Employment Opportunity Commission's regulations implementing the *Americans with Disabilities Act*, as well as some EEOC appellate decisions, specifically provide that parking spaces may, in appropriate circumstances, be required as a reasonable accommodation. It further noted that, aside from bare assertions, management officials offered no evidence that the complainant's request would have created an undue financial burden on the RO's operations.

Management also argued that it denied the request to ensure that it would not discriminate against future disabled applicants who might otherwise be denied employment out of fear they might later need a similar accommodation. OEDCA rejected that argument as a clearly inappropriate reason for denying a necessary accommodation. It also rejected, as merely speculative, management's argument that granting the request might lead to greater costs in the future if other employees made similar requests. Finally, it found management's claim that the complainant requested the parking space, not as an accommodation, but rather, merely "as a handicapped employee" to be a distinction without a difference.

OEDCA cautioned that mere possession of a disability-parking permit issued by a governmental entity does not, in itself, suffice to demonstrate entitlement to a parking space. Because eligibility criteria and procedures for obtaining such permits vary widely from jurisdiction to jurisdiction, individuals may possess them even though they do not have permanent disabilities as defined by the *Rehabilitation Act*. OEDCA noted that to qualify for a space, an individual would have to prove through persuasive medical evidence (1) the existence of a permanent impairment that (2) severely limits the individual's ability to walk the distance in question.

V

DEPARTMENT'S ARGUMENT THAT HARASSER MISTREATS EVERYONE NOT A DEFENSE WHEN THE DEGREE OF HARASSMENT IS UNEQUAL

An African-American female employee filed a discrimination complaint alleging that she was repeatedly subjected to discriminatory harassment over an eighteen-month period because of her race and gender. The harassment was in the form of harsh and verbally abusive treatment by a former high-level VA official. The former official is an African-American male. Following an agency investigation, the complainant requested and received a hearing before an administrative judge appointed by the Equal Employment Opportunity Commission.

At the hearing the Department conceded that the official had treated the complainant in a harsh and abusive manner. By way of defense, however, it argued that he treated all or most of his subordinates in a harsh and abusive manner, both White and African-American, and both male and female. Hence, the Department reasoned that

there could be no discrimination (*i.e.,* no disparate treatment), as everyone was treated poorly. EEOC's administrative judge, as well as OEDCA, concluded otherwise.

The evidence did establish that the official acted in a harsh and abusive manner towards many of his subordinates. The preponderance of the evidence, however, also demonstrated that he was more harsh and abusive towards females than towards males. Moreover, despite the fact that he is African-American, he was even more harsh and abusive towards African-Americans than towards Whites. For example, the RMO repeatedly used racial slurs when referring to African-Americans, often within their hearing. He made similar, racially derogatory references to Whites, but not within the hearing of those to whom he was referring. Female employees, especially the complainant, were rebuked more publicly than males.

The administrative judge concluded that no other employee called as a witness testified to being treated nearly as abusively as complainant was. Hence, the administrative judge found that there was a difference in treatment for which no justification was offered. OEDCA agreed and, despite the fact that the official and the complainant are both African-Americans, adopted the judge's recommended finding of racial and gender-based harassment.

OEDCA also adopted the judge's recommendation that complainant receive $25,000 in nonpecuniary, compensatory damages for the mental pain and suffering she endured for more than eighteen months. Perhaps the most poignant example occurred when harassment-related problems at work caused her to cancel plans to visit her parents at Thanksgiving and wait, instead, until Christmas. Her father died during the interval.

VI

TEMPORARY INJURY NOT A DISABILITY WITHIN THE MEANING OF THE *REHABILITATION ACT*

An employee filed an EEO complaint based on disability (left hand, shoulder, arm injury) after management rescinded an offer of employment as a temporary food service worker.

The complainant was interviewed and later selected for a temporary position as a food service worker. Prior to the date he was to report for new-employee orientation, he suffered an injury to his shoulder, arm, and left hand. He thereafter failed to report on the day of his scheduled orientation. The complainant informed the Human Resources Management Service later that day that he was seeking medical treatment for his injury and that he would be unable to report for orientation for at least two weeks. After being informed of the complainant's failure to report, the responsible management official (RMO) who hired the complainant rescinded the offer of employment.

The RMO testified that there was an immediate need to fill the food service position and that he was initially enthusiastic about hiring the complainant. He further testified that his

feelings changed due to the complainant's inability to follow up and communicate with management after the job interview. He explained, for example, that management first had difficulty locating the complainant to schedule a pre-employment physical examination, and that after they finally were able to schedule it, he failed to show up. He further explained that management also had difficulty locating the complainant to schedule his orientation, and that after scheduling him, he stated he would need at least two weeks, possibly more, before being able to report to the orientation. Due to the complainant's lack of communication, the official expressed the fear that the complainant might be unreliable and a potential problem employee.

In its final agency decision, OEDCA determined that the complainant failed to establish that he is an "individual with a disability" within the meaning of the *Rehabilitation Act* and EEOC's regulations implementing the Act. Specifically, OEDCA found that the complainant failed to present any evidence to show that his injury resulted in a permanent impairment; nor did he present evidence that it substantially limited a major life activity. In addition to finding no evidence of an actual disability, OEDCA also found no evidence that management officials perceived him as disabled, notwithstanding their knowledge of the injury at the time they rescinded the offer of employment. Hence, the complainant failed to satisfy his initial burden of establishing a *prima facie* case of discrimination.

OEDCA also determined that management articulated legitimate, nondiscriminatory reasons for rescinding the offer of employment. Those reasons were based on incidents that occurred prior to the complainant's failure to report for employee orientation, the fact that the position had to be filled as soon as possible, and the fact that the complainant could not provide a specific date that he would be able to report for work.

In an attempt to establish that those reasons were a pretext for discrimination, the complainant argued that he did not inform the RMO about not reporting for orientation because he was told to report it to the Human Resources Management Service. OEDCA found that this argument was insufficient to satisfy the complainant's burden of proving pretext by a preponderance of the evidence, especially given his earlier failure to report for a pre-employment physical.

VII

TERMINATION OF DISABLED EMPLOYEE BECAUSE OF A PERCEIVED RISK OF FUTURE INJURY VIOLATED THE *REHABILITATION ACT* WHERE THERE WAS NO INDIVIDUALIZED ASSESSMENT OF COMPLAINANT'S WORK AND MEDICAL HISTORY, AND NO ATTEMPT TO ACCOMMODATE HER IN HER ASSIGNED POSITION

Complainant, a staff nurse on a psychiatric unit, filed a complaint alleging, among other things, that her termination from employment was due

to discrimination because of her disability (degenerative joint disease of the cervical and lumbar spine and left knee).

Management asserted that it terminated the complainant because she could not safely perform a functional (physical) requirement of her position, namely heavy lifting. Hence, she posed a risk of future harm or injury to herself and/or others. The decision to terminate her was based primarily on the recommendation of a Physical Standards Review Board that examined her fitness for duty. The board essentially concluded that, since the ability to lift 45 pounds is a functional requirement for all staff nurse positions, the complainant's 25-pound lifting restriction rendered her incapable of safely performing an essential duty.

In its final agency decision, OEDCA determined that the medical documentation submitted by the complainant was insufficient to establish that she actually had a disability within the meaning of the *Rehabilitation Act* and EEOC's regulations implementing the Act. A 25-pound lifting restriction, by itself, does not constitute a disability, as such a restriction does not substantially limit any major life activities. Furthermore, it was not clear from the medical evidence whether her impairment was permanent or temporary. Nevertheless, OEDCA found that, even if she did not have an actual disability, management clearly perceived her as having a condition that substantially limited her ability to work as a nurse. Accordingly, OEDCA concluded that the complainant was an "individual with a disability" within the meaning of the *Rehabilitation Act.*

Management argued that the complainant was not a "qualified individual with a disability" because she could not perform the functional lifting requirements for staff nurse positions, thus suggesting that the physical requirements of the position equated with the essential elements of the position. Management's argument, in essence, was that no one with a 25-pound lifting restriction could perform staff nurse duties. OEDCA noted, however, that identification of the essential elements of a position requires a fact-specific inquiry into both the employer's description of the duties (*i.e.*, the "PD") and how those duties are actually performed in practice.

The complainant provided credible testimony, supported by other evidence in the record, to show that there was less heavy lifting in the psychiatric unit as compared with other units, and that she could, with reasonable accommodation, perform the essential duties of her position. As for lifting, she noted that other nurses were always available to help her with incapacitated patients; and that more than one nurse is normally involved when lifting heavy patients. OEDCA therefore determined that the complainant's inability to meet a functional lifting requirement did not prevent her from being able to perform the essential duties of her position, as they are actually performed in practice.

Management further argued that the Complainant was not a "qualified individual with a disability" because of

the risk of future injury - in other words - her back condition constituted a "direct threat" to her health or safety and the health or safety of patients. OEDCA found, however, that management failed to satisfy its burden of proof as to the direct threat defense. To assert such a defense successfully, management must demonstrate that it conducted an individualized assessment of the complainant's work and medical history that took into account such factors as the nature and duration of the risk, its severity, and the probability that harm would occur. It must further demonstrate that such assessment revealed a reasonable probability of substantial harm. Fears based merely on conjecture and speculation, rather than sound medical evidence, will not suffice.

The board's recommendation to terminate was conclusory at best. Management failed to conduct an individualized assessment of the complainant's work and medical history that would have taken into account the above-cited factors. Hence, there was no medical evidence that complainant's continued performance of nursing duties would have created a reasonable probability of substantial harm to herself or others. Management's claim that "it would be difficult for complainant to work as an RN", and its belief that her condition would worsen in the future, even if true, do not satisfy the requirement for an individualized assessment.

Since the complainant was a "qualified individual with a disability," management had an obligation to attempt to accommodate her in her assigned position. Only if such an accommodation would have created an undue hardship on nursing operations could management then consider reassignment to other positions. Management officials admitted that they did not consider accommodating the complainant in her assigned position based on the belief that she was no longer qualified for it. They failed to offer any evidence that accommodating the lifting restriction, as suggested by the complainant, would have created an undue hardship for the nursing service. Instead, they simply terminated her after determining that she was not qualified for any job vacancies at the facility.

OEDCA thus found that management's failure to accommodate the complainant, and the subsequent decision to terminate her employment, violated the *Rehabilitation Act*.

VIII

SAME-SEX HARRASSMENT CLAIM FAILS WHERE INCIDENTS WERE NOT SEVERE OR PERVASIVE, AND EVIDENCE INDICATED THAT CONDUCT WAS NOT UNWELCOME

An employee filed a complaint alleging, among other things, that his male supervisor sexually harassed him. He claimed that the supervisor occasionally called him names like "boy," (complainant is Caucasian) and told him he looked "pretty." He also alleged that the presence of pornographic magazines in the work area created a sexually hostile work environment. He further alleged that the supervisor had altered two photographs of him in such a way as to produce an obscene picture, and that, on one of them, had written a message

suggesting that the complainant was willing to engage in certain sex acts with men.

The supervisor admitted making the comments, and that he was aware that pornographic magazines were present in the work area. He also admitted altering a photograph (the one with the message written on it), but added that it had occurred three years earlier. He denied any involvement with the second photograph that apparently surfaced shortly before the complainant filed his complaint.

In its analysis, OEDCA noted at the outset that same-sex harassment is clearly prohibited by Title VII of the *Civil Rights Act* in light of the Supreme Court's recent decision in *Oncale v. Sundowner Offshore Services*. In addition, except for the second photograph incident for which there was no evidence as to its origin, OEDCA found that the incidents complained of did occur, as alleged.

However, while finding that most of the incidents occurred, OEDCA also found persuasive evidence that the conduct the complainant was now complaining about was not unwelcome. The preponderance of the evidence demonstrated that the complainant often initiated, and was an active participant in, the sexual banter and joking that commonly occurred in the boiler plant. The evidence further indicated that he brought X-rated movies into the boiler plant and distributed them to coworkers, and that he enjoyed telling his supervisors about how he and a female friend allowed people to watch them engage in sexual activity in the "break room."

Further, management officials noted that the complainant had received an admonishment two years earlier when he was found at his desk perusing pornographic magazines, even though he had failed to complete an assigned task. Finally, they noted that shortly before filing his complaint he received a reprimand for calling his supervisor an obscene name.

Examining the record as a whole, OEDCA found that, while there was evidence that most of the incidents complained of did occur, they were not unwelcome, as evidenced by the complainant's enjoyment of, and active involvement in, the sex-related conversations and activities occurring in the work area. In addition, the complainant's lengthy delay in complaining about most of the incidents clearly suggests that he did not subjectively perceive them as abusive or hostile at the time. Moreover, the incidents alleged were not so severe or pervasive as to create an objectively hostile environment that changed the terms and conditions of his employment.

As noted by the U.S. Supreme Court in several recent cases, workplace harassment does not automatically constitute sexual harassment merely because comments have sexual content or connotations; and Title VII's prohibition against sexual harassment is not to be construed as a "general civility code." It does not prohibit the "sporadic use of abusive language, gender-related jokes, and occasional teasing." Conduct

must be "extreme," according to the Court, to amount to an actual change in the terms and conditions of employment.

Further, the record indicates that, as soon as the complaint was filed, management officials acted promptly to remove sexually explicit magazines from the boiler plant, and to prohibit conversations with sexual content. Moreover, there was nothing in the record to justify the complainant's lengthy delay in complaining about most of the incidents.

OEDCA concluded that the complainant failed to prove by a preponderance of the evidence that management was liable for a sexually hostile work environment.

IX

SUPERVISOR WHO DISCOURAGED COMPLAINANT FROM FILING AN EEO COMPLAINT COMMITTED A *PER SE* VIOLATION OF EEOC'S ANTI-RETALIATION REGULATIONS NOTWITHSTANDING THE ABSENCE OF AN "ADVERSE ACTION"

An employee filed a complaint alleging reprisal due to past EEO activity and harassment due to her gender. An EEOC administrative judge recommended that the Department issue a decision finding that she had not been harassed, but that the Department had violated EEOC's anti-retaliation regulations by attempting to discourage her from filing her complaint. After reviewing the record in its entirety, OEDCA accepted the administrative judge's recommendations.

The record showed that the complainant's supervisor met with her privately to question her about her contact with an EEO counselor. The preponderance of the evidence supported the complainant's testimony that during the meeting the supervisor became angry and accused her of telling other employees about her allegations against him. In addition, he told her that if she pursued the complaint, no one would believe her; that she would make a fool of herself; and that she "should just drop it and leave it alone." Finally, he suggested to her that he might start documenting complaints he was receiving about her from her co-workers if she persisted in pursuing the matter.

Although the complainant did pursue her complaint, the supervisor took no action against her.

Notwithstanding the absence of an "adverse action" against her, OEDCA agreed with the administrative judge that the supervisor had committed a ***per se*** violation of EEOC's anti-retaliation regulations (in other words, an automatic violation that does not require evidence of an "adverse action"). Those regulations prohibit, among other things, any attempt to restrain or otherwise interfere with a complainant's right to participate in the EEO complaint process.

X

EMPLOYEE ENGAGING IN CURRENT USE OF ILLEGAL DRUGS DURING PERIOD OF ALLEGED DISCRIMINATION IS NOT AN "INDIVIDUAL WITH

A DISABILITY" AS DEFINED BY THE *REHABILITATION ACT*

The complainant alleged, in part, that he was discriminated against and harassed due to a disability (drug addiction) in connection with several incidents, mostly involving his co-workers. He claimed, among other things, that they tampered with his medical equipment, interfered with his quality assurance tests, told others he had an attitude problem, suggested he must have been selling drugs to be able to afford his automobile, wrote comments about him on a wall calendar, and stole his lunch from the refrigerator.

The complainant alleged that, because he was a recovering drug addict, he was an "individual with a disability." Evidence in the record did show that he had completed a drug rehabilitation program a year before the alleged harassment began.

In its decision, OEDCA noted that *The Rehabilitation Act* excludes from the definition of "individual with a disability" individuals who are currently engaging in illegal drug use. An individual, however, is not excluded from the definition (in other words, an individual is considered disabled) if he or she has successfully completed a supervised rehab program and is no longer using illegal drugs; or is participating in a supervised rehab program and is no longer using illegal drugs; or is erroneously regarded as engaging in illegal drug use.

OEDCA found that the complainant had failed to establish a *prima facie* case of disability discrimination because he had resumed using illegal drugs. Although he subsequently entered an outpatient rehabilitation program after his relapse, it was at or near the time the alleged harassment had ended. The preponderance of the evidence indicated that, throughout most or all of the period during which he claimed he was being harassed, he was using illegal drugs and, hence, was not an individual with a disability.

XI

DEMAND BY RMO THAT COMPLAINANT BE DISCIPLINED BECAUSE OF HER LETTER ACCUSING HIM OF RETALIATION, ALONG WITH NEGATIVE COMMENTS BY THE RMO ABOUT THE EEO COMPLAINT PROCESS, CONTRIBUTE TO FINDING OF RETALIATORY INTENT

An employee filed a complaint alleging retaliation for prior EEO activity when a former supervisor issued a "documented complaint" against her concerning her alleged deficient performance in carrying out certain tasks. Under the complainant's performance appraisal plan, she was allowed no more than two such documented complaints during the period covered by the plan.

In response, the complainant wrote a letter to her section chief challenging the alleged performance deficiency, and accusing the former supervisor of retaliating against her because of her prior EEO complaint activity. In response to that letter, the former supervisor wrote an angry rebuttal letter in which he demanded that the com-

plainant be disciplined for having written the letter.

After examining the record in its entirety, OEDCA agreed with the complainant, concluding that the former supervisor issued the documented complaint because of her prior EEO activity in the unit that he previously supervised. OEDCA found credible evidence in the record disputing the justification offered by the RMO for the documented complaint.

Moreover, the record demonstrated that the RMO had previously made negative comments about the EEO complaint process to other individuals, including an EEO investigator, and that he had resigned his former supervisory position because of EEO complaints filed by subordinate employees. Further, OEDCA found that the RMO's demand that the complainant be disciplined because of her letter protesting retaliation was, in itself, persuasive evidence of his bias against employees who participate in the EEO process, and of his willingness to retaliate against them when they do so.

XII

SEXUAL HARASSMENT BY A CO-WORKER RESULTS IN A FINDING OF LIABILITY WHERE MANAGEMENT FAILED TO REACT PROMPTLY AND EFFECTIVELY

An employee filed a complaint alleging sexual harassment by a male co-worker. The complainant alleged that the co-worker repeatedly made derogatory comments about her, many of a sexual nature, to other employees and to at least one patient. The comments were degrading, belittling, and abusive, both to her and to women in general. While the coworker had not made any of the comments in her presence, they nevertheless created an abusive and hostile environment for her when they were reported to her by co-workers and patients. The comments included obscene descriptions of her office and accusations that she had obtained her job by sleeping with a physician.

The complainant promptly complained to her supervisor about the harassing remarks. Although the supervisor claims that he "orally counseled" the harasser in the hallway about his conduct, that counseling appears to have occurred some six months after she first complained. Furthermore, the harasser testified that he did not consider that hallway encounter with his supervisor to be a counseling session.

In any event, the harassment continued and the complainant continued to complain. Six more months passed before management took action, this time in the form of a written counseling.

Despite the written counseling, the harassment continued. Complainant then filed a formal EEO complaint. Two months after filing her EEO complaint (and some 15 months after she first complained to her supervisor), the facility convened an administrative investigation board to inquire into the complainant's allegations. Six weeks later, the board issued a report concluding that the complainant had been subjected to a hostile and abusive environment, a conclusion in which her

supervisors concurred. Following the board's report, management initiated steps to remove the harasser who, in response to a proposed removal notice, resigned. His resignation occurred almost two years after the complainant first complained of the harassment. The supervisor to whom the complainant first complained was eventually demoted, and he too resigned shortly after the harasser's departure.

Management officials no doubt believed that they would not be liable for the harassment because they responded to, and eventually resolved, the matter by taking appropriate action against the harasser and the supervisor.

OEDCA disagreed. Management's obligation to respond to harassment by coworkers requires prompt and effective action as soon as it becomes aware of the harassment. The initial actions taken in this case were neither prompt nor effective, as evidenced by: (1) the lengthy intervals between complainant's first report of the problem to her supervisor and the subsequent actions taken in response to her report; and (2) the continued harassment that followed the oral and written counselings. The mere fact that the harassment eventually ceased does not absolve management for failing to respond more quickly and effectively when it first learned of the problem.

XIII

REASONS ARTICULATED FOR NONSELECTION FOUND NOT CREDIBLE IN VIEW OF CONFLICTING AND INCONSISTENT TESTIMONY BY THE SELECTING OFFICIALS AND EVIDENCE OF RETALIATORY ANIMUS

An employee applied, but was not selected, for a position as a carpentry worker. He filed a complaint alleging that his nonselection was due to his race (African-American) and was in retaliation for his prior EEO complaint activity. OEDCA accepted an EEOC administrative judge's recommended decision finding that the nonselection was due to the complainant's race and prior complaint activity.

OEDCA found, as did the administrative judge, that the reasons articulated for the complainant's nonselection, namely his incorrect answers to technical questions during the interview and his poor leave record, were not credible and, hence, were a pretext to mask unlawful discrimination and reprisal. Specifically, the two officials who conducted the interviews gave inconsistent and conflicting testimony regarding the complainant's answers during the interview, his leave record, and the absence of African-American carpentry workers.

For example, while one official testified that the complainant's answer to a question concerning drywalls was incorrect, the selectee, who gave the same answer, was found to have responded correctly. In addition, although the complainant's low leave balance was cited as an additional reason for his nonselection, the complainant's official leave records contradicted that reason. Finally, when asked why there were no African-American carpentry workers at the facility, the selecting officials claimed

that few African-Americans apply for these positions. The record, however, demonstrated that the complainant had frequently applied for these positions, and that all of the applicants for this selection action, except for the selectee, were African-American.

As for the retaliation claim, the record included persuasive evidence of retaliatory animus by one of the selecting officials. The official told the complainant during the job interview that he was offended by the complainant's prior EEO complaint. The record also shows that the same official made a similar statement to the EEO counselor.

XIV

COMPLAINANT'S CLAIM FAILS BECAUSE HE OFFERED NO EVIDENCE THAT HIS NONSELECTION WAS BASED ON DIVERSITY CONSIDERATIONS

The complainant, who was nonselected for a Biomedical Engineering Technician position, alleged that the selecting official chose a female candidate simply because of her gender in an effort to promote diversity.

The record indicates that both the complainant and the female selectee were well qualified and had received similar scores during the rating and ranking process that preceded the referral of candidates for interviews. The selecting official testified that the quality of the selectee's experience was better since she acquired it at two large, complex medical facilities as opposed to the complainant's experience at a small facility. As this articulated reason was clear and specific, it was sufficient to shift the burden to the complainant to prove by a preponderance of the evidence that the articulated reason was not the true reason, but was, instead, a pretext for gender discrimination.

The complainant offered no evidence of such pretext, except to claim that the selecting official chose a female applicant simply because of diversity considerations. He presented no evidence, however, to support his claim. The selecting official denied that diversity was a factor in his decision; and there was no evidence in the record indicating that the selecting official was influenced by such considerations. OEDCA noted that a complainant's burden of proof requires far more than a mere belief or suspicion of wrongdoing; it requires proof by a preponderance of the evidence. The complainant failed to satisfy that burden of proof.

XV

RACE DISCRIMINATION FOUND WHERE NURSE PROMOTION BOARD MEMBERS FAILED TO ARTICULATE CLEAR AND SPECIFIC REASON FOR DECISION NOT TO PROMOTE COMPLAINANT TO NURSE GRADE II

The complainant alleged that he was denied promotion to the grade of "Nurse II" because of his race (African-American) and gender. Specifically, he alleged that he was eligible for promotion; he had satisfied all of the Nursing Service's stated criteria for promotion to that grade; evidence of that fact was specifically noted in his

"proficiency report" (*i.e.*, his annual performance appraisal); and less qualified Caucasian female nurses were promoted. An EEOC administrative judge agreed with his claim and recommended that the Department issue a finding of race and gender discrimination. OEDCA accepted the administrative judge's recommendation, noting that nursing service officials had failed to articulate clearly and specifically the reasons for finding the complainant unqualified for the promotion.

The criteria and procedures for promoting nurses in the VA are unlike those utilized in typical competitive or career-ladder (*i.e.*, non-competitive) promotion actions in the Federal personnel system. Unlike competitive promotion actions, nurses may be promoted to certain grades without the need for a vacancy, as the grade is linked, not to a position, but rather, to the individual's qualifications, performance, and scope of responsibilities. Moreover, unlike career-ladder promotions, nurses are not automatically entitled to promotion merely because of satisfactory performance. Instead, nurses must meet the performance criteria and educational requirements for the next higher grade, as stated in the *VA Nurse Qualification Standards*, in order to be considered for promotion.

Evidence that the nurse has met the performance criteria is found in the nurse's annual proficiency report. The proficiency report summarizes the nurse's scope of responsibility, performance, and achievements for the previous year. If the Nurse Professional Standards Board concludes, based on a review of the proficiency report, that the nurse has not met the performance criteria, it will recommend that the nurse not be promoted. If a nurse is not promoted, and the scope of his or her responsibility does not change, further promotion review will take place at intervals of 1 to 3 years, at the discretion of the Board.

The complainant argued that his proficiency report contained specific examples of skills and achievements that satisfied all of the stated promotion criteria, thus contradicting the Board's conclusory finding that there was no evidence in his proficiency report regarding certain specified criteria. The Board did not explain why the references in his proficiency report relating to those specified criteria did not justify a promotion. Instead, it simply concluded, without explanation, that they did not.

Both during the agency investigation, and later at the EEOC hearing, nursing service officials, including the Chief Nurse, again offered no specific testimony to explain or otherwise justify the board's conclusory finding.

Management's intermediate burden of articulation is not an onerous one. Nevertheless, to satisfy this burden, it must present reasons that are clear and specific enough to give a complainant an adequate opportunity to respond. Simply stating, for example, that someone is "unqualified", without identifying the specific reason(s) for that conclusion, does not suffice to satisfy management's burden of articulation. In this case, management failed to provide such specificity, and the complainant

was, therefore, entitled, as a matter of law, to a finding in his favor.

Even assuming that management's reason, vague as it was, was adequate, there was sufficient evidence in the record to establish that the reason was pretextual. The record indicated that one of the Board's members had voted in favor of the complainant's promotion, and other similarly qualified White female nurses were promoted without any explanation as to why their proficiency reports were considered better than the complainant's report in terms of the skills and achievements cited in those reports. Moreover, the fact that the complainant was promoted by the next Board, without any apparent change in the scope of his responsibilities, along with management's vague articulation, demonstrate that the reason cited for his non-promotion was a pretext for discrimination.

XVI

RETALIATION FOUND WHERE FORMER EMPLOYEE WAS REMOVED FROM A NURSE TRAINING PROGRAM BECAUSE OF HIS PRIOR EEO COMPLAINT ACTIVITY

An employee filed an EEO complaint after being removed from his position as a medical records technician. He later enrolled in a nursing school that required, among other things, completion of an 8-week practicum at a hospital. The school arranged for the complainant to train at the VA medical center where he was previously employed. He began his training at the VAMC while the EEO complaint concerning his removal was still pending. During the course of his training, the VAMC director recognized him in the hallway and ordered that he be escorted off the premises immediately and told not to return. The VAMC then notified the nursing school that the complainant could not continue in the training program.

The facility director claimed that his actions were justified because the complainant's presence at the facility posed a "conflict of interest." He stated that the pending EEO complaint against his facility suggested to him that the complainant was angry enough with the VA that he might, for example, attempt to sabotage patient records.

OEDCA found that management's actions in this case unquestionably constituted retaliation against the complainant because of his prior EEO activity. *(Note: The Office of the General Counsel had previously determined that the particular circumstances surrounding the complainant's status as a trainee at the facility gave him standing (i.e., made him eligible) to file a complaint, even though he was technically not an employee.)*

XVII

SUPERVISOR'S FAILURE TO DOCUMENT REASONS FOR TERMINATION OF TEMPORARY APPOINTMENT RESULTS IN A FINDING OF DISCRIMINATION

A physician filed a complaint alleging that the termination of his temporary appointment was due to his race, religion, and national origin (Asian, Islam, India). He had been employed in a temporary status for eleven years because he was not a U.S. citizen. The reason given for his termination, however, was unsatisfactory performance – he failed to return pages promptly and he had been observed sleeping in the library. An EEOC administrative judge recommended a finding of discrimination as to all bases alleged, and OEDCA accepted that recommendation.

The record indicated that the complainant's three most recent performance appraisals from the supervisor who terminated him indicated "high satisfactory" performance. The most recent appraisal noted that the complainant had "significantly improved" with regard to returning his calls. Although there was no direct evidence of discriminatory animus towards the complainant, the administrative judge found, and OEDCA agreed, that the reasons articulated for his termination were unsupported by the record.

Management argued, in essence, that the complainant's supervisor was simply negligent in failing to document the complainant's shortcomings. OEDCA found that argument to be insufficient to justify a finding in the Department's favor. The complainant's three most recent performance appraisals, all indicating "high satisfactory" performance, and the lack of documented evidence supporting the reasons for his termination, were sufficient to satisfy his burden of proving by preponderant evidence that the reasons were a pretext for discrimination.

XVIII

INCREASE IN RETALIATION CLAIMS PROMPTS EEOC TO ISSUE NEW GUIDANCE IN ITS *COMPLIANCE MANUAL*

In a recent article appearing in the *Employment Discrimination Report* (Vol. 11, No. 19, p. 665), the Bureau of National Affairs noted that the number of retaliation charges filed with the Equal Employment Opportunity Commission has ballooned from under 8000 in 1991 to more than 18,000 last year.

Retaliation occurs when an employer takes an "adverse action" against an employee for complaining about discriminatory practices prohibited by civil rights laws such as Title VII of the *Civil Rights Act of 1964*, the *Age Discrimination in Employment Act*, the *Rehabilitation Act*, and the *Americans with Disabilities Act.*

Although these figures represent private sector cases, there is a similar rise in the Federal sector as well. Retaliation claims are frequently raised in discrimination complaints filed against the VA, and such claims, thus far, have accounted for approximately 40% of the findings of discrimination issued by OEDCA.

One of the ironies of this type of claim is that complainants will occasionally prevail, even when their underlying discrimination complaint fails for lack of evidence. For example, an employee

may file several complaints without success, yet later succeed in a retaliation claim because management took an adverse action against the complainant out of sheer frustration with having to deal with the prior complaints.

In response to the growing number of retaliation complaints, the EEOC recently issued new guidance on analyzing such claims. The guidance is found in the new Section 8 of its revised *Compliance Manual*. The guidance notes that there are three essential elements to a retaliation claim: (1) protected activity, (2) an "adverse action", and (3) a causal connection between the protected activity and the adverse action. The new guidance describes in detail what constitutes EEO "protected activity", what an "adverse action" is, and the various types of evidence that may establish a causal connection between them.

One hotly debated issue receiving considerable attention by the courts is the degree of harm required before the action complained of can be considered an "adverse action." The most obvious types of adverse actions include denial of promotion, refusal to hire, demotion, suspension, and removal. There is clearly no question that the harm occasioned by these actions is "adverse" to the employee. The problem arises when the degree of harm is less severe; or when, to avoid suspicion, a supervisor reacts to the protected activity in a more subtle manner.

Some courts have held that this element of a retaliation claim is limited to an "ultimate employment action." Thus, actions such as reassignments, reprimands, and poor evaluations would not constitute adverse actions according to these courts. Other courts, though not requiring an "ultimate" action, nevertheless require a showing that the action "materially affect the terms or conditions of employment."

Other courts are even more liberal, prohibiting any adverse treatment that is based on retaliatory motive and that is likely to deter protected activity. Excluded from this definition are the petty slights and trivial annoyances that commonly occur in the workplace, as they would not likely deter protected activity.

In its new guidance, the Commission has adopted the views expressed in the latter, more liberal line of cases, noting that the degree of harm suffered by an individual is only relevant to the issue of relief, not liability. In other words, even if complainants suffer little or no harm as a result of unlawful retaliation, they are entitled to a finding in their favor, even though they may not be entitled to much relief. Since EEOC's directives and interpretations bind Federal agencies, OEDCA will follow EEOC's guidance.

The key to analyzing this issue is determining if the actions or conduct complained of would likely deter EEO protected activity. Thus, the Commission has found that even a threat to retaliate that is not carried out would constitute an "adverse action", as such threats are likely to deter EEO protected activity. Such actions or conduct are often referred to as ***per se*** violations. In other words, the conduct violates EEOC's anti-retaliation regulations

prohibiting restraint and interference in the EEO process, even though no actual harm occurs. A case involving reprisal *per se* is summarized in this issue of the *OEDCA Digest*.

Using the same reasoning, the Commission considers retaliatory harassment to fall within the definition of "adverse action", provided the conduct or actions complained of are significant enough to deter protected activity.

Of course, whether conduct is significant enough to deter protected activity is a factual question that can only be determined on a case-by-case basis.